BEFORE THE

STATE OF CALIFORNIA

OCCUPATIONAL SAFETY AND HEALTH

APPEALS BOARD

In the Matter of the Appeal of: DPS PLASTERING, INC. 3O26 S. Halladay Street Santa Ana, CA 92705 Employer	Docket Nos. 00-R3D1-3865 through 3867 **DECISION AFTER RECONSIDERATION**

The Occupational Safety and Health Appeals Board (Board), acting pursuant to authority vested in it by the California Labor Code and having taken the petition for reconsideration filed in the above entitled matter by DPS Plastering (Employer) under submission, makes the following decision after reconsideration.

JURISDICTION

On July 20, 2000, a representative of the Division of Occupational Safety and Health (the Division) conducted a plain view inspection at a place of employment maintained by Employer at 40880 Winchester Road, Temecula, California (the site). On October 20, 2000, the Division issued to Employer citations alleging a serious violation of section[1] 3382(a) [face and eye protection], with a proposed civil penalty of $5,060, and second repeat serious violations of sections 1637(n)(1) [unobstructed access] and 1644(a)(6) [metal scaffolds], with proposed civil penalties of $64,800 each.

Employer filed a timely appeal contesting the existence and classifications of the alleged violations and the reasonableness of the proposed civil penalties.

On August 9, 2001, a hearing was held before Barbara J. Ferguson, Administrative Law Judge (ALJ) of the Board, in Anaheim, California. Eugene F. McMenamin, Attorney, represented Employer. Allan Coie, Staff Counsel, represented the Division.

On September 7, 2001, the ALJ issued a decision denying Employer's appeal but reclassifying the violation of section 3382(a) from serious to general and reducing the civil penalty from $5,060 to $380.

[1] Unless otherwise specified, all section references are to Title 8, California Code of Regulations.

On October 11, 2001, Employer filed a petition for reconsideration. The Division filed an answer on November 15, 2001. The Board took Employer's petition under submission on November 29, 2001.

EVIDENCE

Employer is a plastering contractor whose employees were working from a scaffold platform chipping stucco and plaster with screwdrivers, chisels and hammers at a Circuit City site. Employer was cited for a serious violation of section 3382(a) because its employees wore no face or eye protection while so engaged. It was also cited for two second repeat serious violations, to wit, section 1637(n)(1) for not having a safe and unobstructed means of access to the scaffold platforms and section 1644(a)(6) for lack of securely attached railings installed on the open sides and ends of the scaffolds.

At hearing, the ALJ found that the Division established a violation of section 3382(b) but failed to establish the serious classification for the violation. The ALJ reduced the classification of the violation to general and reduced the proposed civil penalty to $380. Employer presented no evidence to refute the alleged violation.

The ALJ, without objection, took official notice of the prior violations of sections 1637(n)(1) and 1644(a)(6) and Employer admitted the existence of the violations of those sections as they were charged in the instant proceeding. A civil penalty of $64,800 was proposed for each of the second repeat serious violations.

David Schutte, Employer's CEO and owner, was Employer's only witness. He testified about Employer's financial condition but produced no tax returns, accounting reports, or any other business or financial records.

ISSUES

1. Has Employer made a sufficient showing of financial hardship to warrant reduction of the assessed civil penalties?

2. Has Employer demonstrated that the plan for payment of the civil penalties over a period of time as ordered by the ALJ is unreasonable?

FINDINGS AND REASONS FOR DECISION AFTER RECONSIDERATION

The Board has reviewed Employer's petition for reconsideration, the ALJ's decision, and the record of the proceeding. The Board finds that the ALJ did not exceed her authority and that the evidence supports the ALJ's findings of fact.

1. Employer Failed to Establish a Basis for Reduction of the Civil Penalties on Grounds of Financial Hardship

Employer submits that it proved by a preponderance of evidence that the civil penalties assessed by the Division are excessive and unreasonable and asserts that they should be set aside or reduced to a reasonable amount consistent with Employer's ability to pay such penalties.

a. Authority of the Board to Provide Penalty Relief

The Board is mindful that there is a separation of powers built into the Cal/OSHA system. The Standards Board is vested with quasi-legislative authority to promulgate health and safety standards and safety orders. (Labor Code § 142.3) The Division has executive enforcement authority of the Act (Labor Code § 6307, 6308), and the Director of Industrial Relations has both executive and quasi-legislative authority. (Labor Code §§ 50.7, 51, 6319(c)) The Appeals Board has quasi-judicial power to determine appeals from citations, penalties, and orders issued by the Division. (Labor Code §§ 148.6, 6600 et seq.)

A primary rule regarding the authority of administrative agencies is that the agencies only have such powers as have been conferred upon them, expressly or by implication, by Constitution or statute. (*American Federation of Labor* v. *Unemployment Ins. Appeals Board* (1996) 13 Cal.4th 1017) [2]

The Board is an independent adjudicatory agency responsible for resolving appeals from citations. (*Rick's Electric, Inc.* v. *California Occupational Safety and Health Appeals Bd.* (2000) 80 Cal.App.4th 1023, 1027.) Labor Code section 6602 provides, in relevant part, that for a citation, notice, or order, timely contested by an employer, the Board shall afford an opportunity for a hearing and "thereafter issue a decision, based on findings of fact, *affirming, modifying or vacating the division's citation, order, or proposed penalty, or directing other appropriate relief."* A decision of the Appeals Board is final subject to rehearing or judicial review, and is binding on the Director and the Division with respect to the parties involved in a particular appeal. (Labor Code sections 148.5, 148.6) The statutory provisions regarding the authority of the Board establish its preeminence in interpreting and applying health and safety standards and regulations. (*Airco Mechanical, Inc.,* Cal/OSHA App. 99-3140, Decision After Reconsideration (Apr. 25, 2002), citing *Limberg Construction*, Cal/OSHA App. 78-433, Decision After Reconsideration (Feb. 21, 1980).)

The Director of Industrial Relations has the express authority to promulgate regulations regarding the assessment of civil penalties under and in accordance with Labor Code section 6319(c). The Board has interpreted and

[2] While previous Decisions After Reconsideration have used the term "equitable authority" to describe the Board's discretion and ultimate authority for assessment of penalties, it is perhaps more accurate to describe the power as based upon an implied or inherent power necessary for the administration of express powers granted under the statute pursuant to Labor Code sections 148.5, 148.6, and 6602(a).

applied the statute and penalty assessment regulations to govern the manner in which the Division classifies and calculates a proposed civil penalty for a citation issued to an employer. (See, e.g., *Pacific Underground Construction, Inc.,* Cal/OSHA App. 89-510, Decision After Reconsideration (Nov. 28, 1990); *Valley Refrigeration, Inc.,* Cal/OSHA App. 92-1867, Decision After Reconsideration (Jan. 31, 1996).) The Board has previously recognized that penalties calculated in accordance with the Director's regulations pursuant to section 6319(c) are presumptively reasonable. (*Dye & Wash Technology*, Cal/OSHA App. 00-2327, Denial of Petition for Reconsideration (Jul. 11, 2001).) This is consistent with judicial case law establishing that an administrative agency's regulations are presumed to be valid (*Young* v. *Department of Fish and Game* (1981) 124 Cal.App.3d 257)) and in performing administrative action, an agency is presumed to have performed regularly its official duty (Evidence Code § 664; *Ralphs Grocery Co.* v. *Reimel* (1968) 69 Cal.2d 172, 175 [a strong presumption of regularity is accorded administrative rules and regulations when reviewed by the courts]).

In deference to the separation of powers between the legislature and judiciary, courts exercise limited review of legislative delegation of administrative authority to an agency and to the presumed expertise of the agency within its scope of authority. *(McBail & Co.* v. *Solano County Local Agency Formation Com'n* (1998) 62 Cal.App.4th 1223) As an independent quasi-judicial agency, the Appeals Board similarly affords deference to the penalty calculations proposed by the Division made in accordance with the penalty regulations promulgated by the Director--with the proviso that the Division only proposes a penalty while the Appeals Board reviews the reasonableness of the proposed penalty *if contested* by the employer, and ultimately assesses the penalty pursuant to its authority under Labor Code section 6602. Thus, while there is a presumption of reasonableness to the penalties proposed by the Division in accordance with the Director's regulations, the presumption does not immunize the Division's proposal from effective review by the Board as the designated reviewing body (see, *California Hotel & Motel Ass'n* v. *Industrial Welfare Com'n* (1979) 25 Cal.3d. 200) which is not bound by the Director's regulations.[3]

The Board must fully recognize its role to oversee implementation of the Legislature's will (i.e., the delegation of administrative authority to the Director to create regulations for penalty calculations) while recognizing our powers to assess penalties and insure due process by providing a fair hearing with fair access by all parties. We believe that basic fairness dictates that the Act be objectively and similarly applied to *all* of California's employers who are each responsible for complying with the Act's obligations. Similar treatment of all employers for purposes of enforcement and adjudication contributes to fair and

[3] Labor Code section 148.6 provides that "[a] decision of the appeals board is binding on the director and the Division of Occupational Safety and Health with respect to the parties involved in the particular appeal." A corollary to this statutory pronouncement is that a position of either the Director or the Division is not binding on the Board. (*Airco Mechanical, Inc.,* supra.) This corollary applies not only to the legal interpretations under the Act but also to the penalty amount which is ultimately assessed.

uniform administration of an Act aimed at providing safe and healthy workplaces for California's workers.

The Board's exercise of discretion in reviewing the reasonableness of proposed penalties contested by an employer is *not* made from a blank slate nor based upon an approach which gives primacy to considerations which are neither included nor contemplated in statutory or regulatory provisions of the Act. Since all regulations must be reasonably necessary to effectuate the purpose of the enabling statute (Government Code §§ 11346.2(b)(1), 11349, 11349.1(a)(1)), the penalty setting regulations cannot be disregarded by the Board which is charged with giving effect to the objectives and substantive provisions of the Act. We find that, as a matter of public policy, only under extraordinary circumstances should the Board deviate from penalty amounts calculated pursuant to criteria and formulae contained in the Director's penalty regulations. Any doctrines or allowable defenses providing for extraordinary penalty relief can only be established through decisions after reconsideration issued by the Board.[4]

Thus, as a matter of public policy and statutory mandate, the Board must adjudicate cases before it fairly and with a purpose of providing effective enforcement of the Act within the parameters of the statutes, regulations, and case law that includes the Board's decisions after reconsideration.

In *Eagle Environmental Inc.,* Cal/OSHA App. 98-1640, Decision After Reconsideration (Oct. 19, 2001), the Board noted that the more recent cases of *Dye & Wash Technology,* supra*,* and *The Bumper Shop, Inc.*, Cal/OSHA App. 98-3466, Decision After Reconsideration (Sept. 27, 2001) provided an approach to financial hardship claims for penalty relief which insures due consideration of the objectives of the Act and the deterrent purposes of the penalty citation system. The primary objective of the Act in promoting safety and health at the workplace for California workers includes affording deference to penalties calculated in accordance with presumptively valid regulations promulgated by the Director as directed by the Legislature. Thus, rather than reviewing the facts in a vacuum from only an employer's perspective in favor of relief, the Board must be mindful of both the parameters of its review and the statutory scheme from which derives the authority for making a determination of final penalty assessments.

b. Employer Failed to Establish a Basis for Granting Penalty Relief (Reduction) Based Upon Financial Hardship

In *Dye & Wash Technology*, supra, at pg. 3, the Board held that

[4] Providing extraordinary penalty relief must be distinguished from the Board's general review for the reasonableness of penalties proposed by the Division under the facts of a case and in accordance with the criteria for imposition of penalties under the Act. The Board's ALJs have *discretion* (subject to review by reconsideration of the Board) to make findings of fact and law to determine the propriety and reasonableness of the Division's proposed penalty under the Act, including the existence or absence of criteria under the Director's penalty calculation regulations and any applicable statutory criteria, and to determine the application of doctrines and allowable defenses regarding penalty relief in accordance with Board precedent.

"[p]enalties may be **eliminated** for financial hardship only if an employer can show that the assessment of <u>any</u> penalty will force it out of business or 'will create a substantial likelihood' of doing that." (Underlining in original; bold added). The Board further held that penalty **reductions** may only be granted where (1) assessment of the full amount would jeopardize an employer's ability to continue operating while maintaining and improving employee safety and health; (2) the employer has abated all violations and has otherwise demonstrated a sincere commitment to employee safety and health; and (3) the employer is unable to pay the proposed penalty in installments spread over a period of time reasonable to the circumstances. (Bold added)

In *The Bumper Shop, Inc.,* supra, at pg. 6, the Board acknowledged the significant role of penalty assessments in achieving the clear purposes of the Act such that an employer with an on-going business must have addressed and corrected the health and safety violations which are the subject of the penalty. The scope of a claim of financial hardship was stated as follows:

> Any claimed financial hardship must be related, both in time and costs incurred, to correcting those [the appealed] violations. To allow otherwise would simply and impermissibly elevate financial hardship (which may be due to any number of economic influences and conditions) over the clear purposes of the Act.

Where an employer raises financial hardship as a basis for challenging penalties, the employer has the burden of proof on all issues pertaining to its financial condition. Employer must provide credible, convincing evidence to support relief from the proposed penalties. (*Paige Cleaners*, Cal/OSHA 96-1144, Decision After Reconsideration (Oct. 15, 1997).) Employer bears the burden of proof by a preponderance of evidence (Evidence Code § 115; *Dye & Wash*, supra.) on all issues pertaining to financial hardship. (*Eagle Environmental, Inc.*, supra.)[5]

In this case Employer did not present any financial records to support its claim of financial hardship. Schutte's testimony of approximations of yearly gross earnings ($4,000,000 to $5,000,000) and his estimated projected net profit for 2001 ("maybe ten grand"), are too summary and conclusory and do not warrant consideration as convincing evidence regarding the company's financial condition. Where an employer seeks reduction of penalties to an amount based upon its ability to pay, it must provide sufficient information to support such request. The Board finds that Employer failed to provide either a requested reduction amount or credible and convincing evidence regarding its

[5] A preponderance of evidence means that the evidence on one side outweighs, preponderates over, is more than, the evidence on the other side, not necessarily in number of witnesses or quantity, but in its effect on those to whom it is addressed. (*People* v. *Miller*, (1916) 171 Cal. 649, 652) In *Miler*, the Supreme Court went on to state: "[a]s good a definition as we have found is that given in *Hoffman* v. *Loud*, 111 Mich. 156, where it is said: '[i]n civil cases a preponderance of evidence is all that is required, and by a 'preponderance of evidence' is meant such evidence as, when weighed with that opposed to it, has more convincing force, and from which it results that the greater probability is in favor of the party upon whom the burden rests.'"

financial condition, and thus, failed to prove by a preponderance of evidence that the proposed penalties are excessive and unreasonable in view of its financial hardship.

Employer nevertheless asserts that the Division failed to *disprove* its contention of unreasonable penalties because the Division sat mute at hearing on the issue of Employer's ability to pay the penalties. Employer misperceives the shifting of the burden of production.[6] Rather, Employer did not present sufficient evidence to shift the burden to the Division. Schutte's testimony regarding financial hardship lacked any documentary support and was merely his own conclusory opinion that lacked any basis for allowing a finding in Employer's favor in the absence of any evidence to the contrary.

Employer also urges us to eliminate or reduce these penalties in order to achieve the "*goal of avoiding the loss of 'employment opportunities* of California working men and women' due to the assessment of unreasonable or excessive civil penalties (emphasis added)," citing to *Specific Plating Company, Inc.*, Cal/OSHA App. 95-1607, Decision After Reconsideration (Oct. 15, 1997). While we have previously recognized the importance of maintaining employment opportunities such can only be an ancillary consideration to the administration of the Act because, as discussed above, such a goal cannot overcome the stated or expressed objective of the Act which is to provide safe and healthy workplaces for California workers.

Here, Employer's lack of compliance has shown a disregard for its workers' safety and its *Specific Plating* argument rings hollow in the face of Schutte's admitted breakdown of management supervision and the establishment of two separate second repeat serious violations. We have stated that even where financial hardship is established, Employer must establish that it has a long history of providing safe employment and a dedicated commitment to safety and health. (*Eagle Environmental,* supra.) Schutte's testimony reveals that he began taking the scaffolding regulations seriously in or about 1996, 16 years after DPS Plastering was formed. This fact together with the establishment of two violations (both second repeat violations) does not establish a long history of a dedicated commitment to safety and health.

Based upon the above, the Board finds that Employer failed to establish a basis for penalty relief sufficient to be excepted from the penalties calculated in accordance with the Director's regulations.

c. Petitioner Failed to Establish that the Payment Plan Was Unreasonable Under the Circumstances

Employer requested a "maximum period" for payment if penalties were assessed. Although the claim for penalty relief based upon financial hardship

[6] The burden of producing evidence will shift from the party with the initial burden when the evidence is such that a ruling in his or her favor respecting the issue would be required in the absence of further evidence produced by the opposing party. (See Evidence Code § 550)

was denied, the ALJ provided a penalty payment plan as an alternative to penalty relief presumably based upon the limited evidence of financial hardship.

Allowing a payment plan is an intermediate form of penalty relief available upon a showing that Employer is unable to make full immediate payment of a proposed penalty. Such request may be made in conjunction with or independent of a request for penalty reduction. The objective in determining the appropriateness of a penalty payment plan is *not* to penalize employers but to insure both the legitimacy of a request for a payment plan which is reasonable to the circumstances and fair administration of the Act upon all employers who are subject to compliance with the Act.

The Board recently stated that "[i]n cases pending disposition before the Board, there must be a sufficient showing by an employer to support a proposed [payment] plan or request for payment of penalties over time." (*P & L Marble (West) Inc.*, Cal/OSHA App. 01-3212, Denial of Petition for Reconsideration (Jan. 9, 2003) at pg. 4.) Recognizing that payment plan requests and circumstances are case specific and the relief is prospective in nature, there are general guidelines which the Board now determines must be followed in order to justify payment over a period of time and be reasonable to the circumstances. An employer bears the burden of proving that it is unable to make full immediate payment of the proposed penalty by providing credible information which includes, but is not limited to, the following:

> 1. Revenue and Expenses. Financial information must be presented at the time of the request, supported by documentation, showing monthly revenue and expenses for the previous year up to the current month. Since the requested relief is prospective in nature and is for payment of a previous violation, the financial information must provide both historical and current information.
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> 2. Time Period for Payment. The requested period of time must be reasonable to the circumstances. (See *Dye & Wash, supra*.) The time period for repayment should not render the consequences to violations so remote in time to the occurrence of the violation.
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> 3. Amount of periodic payment. The amount proposed by the employer must be reasonable to the circumstances considering the following: total amount of penalties, financial condition of the employer, size of the employer, abatement efforts for violations, and number of payments proposed by the employer.

In this case, Employer simply requested the maximum installment plan "if the penalties are assessed." Such a generalized request is inappropriate since it is Employer's burden to establish an evidentiary basis for this intermediate form of penalty relief based upon its claim of an inability to make full payment of the penalty. Lacking an evidentiary basis for the requested relief, the Board cannot meaningfully determine that the ALJ's determination

was unreasonable under the circumstances based upon the criteria set forth above.

Therefore, the Board remands the case to the Hearing Operations Unit for further proceedings which will allow Employer an opportunity to provide the information in support of its requested payment plan in view of the guidelines specified above. The Division shall be allowed an opportunity to respond to the proffered information and the ALJ assigned to hear the matter shall determine whether a payment plan is appropriate; and if so, determine a payment plan which is reasonable to the circumstances.

DECISION AFTER RECONSIDERATION

Employer's appeals are denied and the citations are affirmed with civil penalties assessed in the total amount of $129,980. Further, the case is remanded to the Hearing Operations Unit of the Board to determine Employer's request for a payment plan in view of this decision after reconsideration.

MARCY V. SAUNDERS, Member
GERALD PAYTON O'HARA, Member

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD
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